TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 487.

THOMAS SWAFFORD, PLAINTIFF IN ERROR,

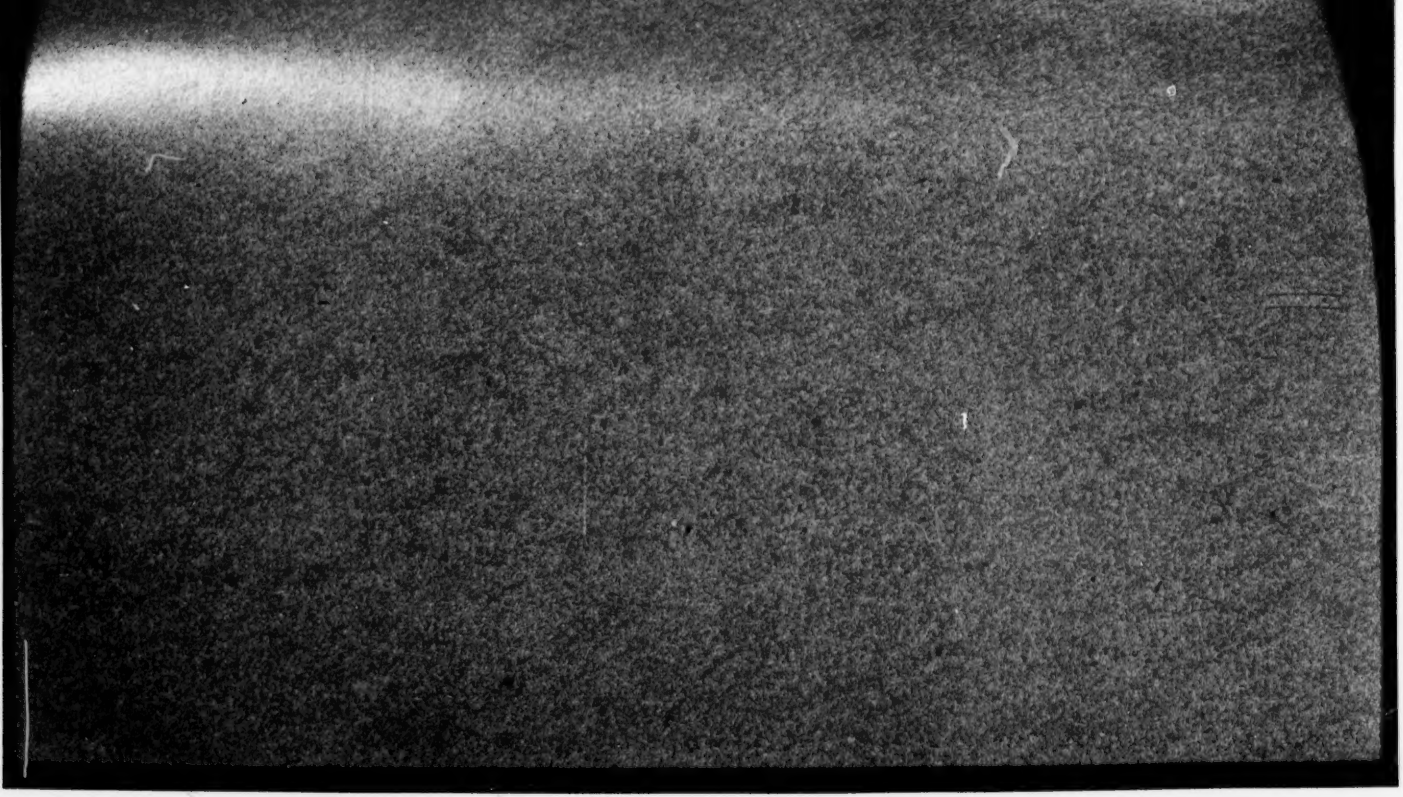
vs.

W. A. TEMPLETON AND S. H. PEABODY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

FILED DECEMBER 2, 1901.

(18,340.)



(18,340.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 487.

THOMAS SWAFFORD, PLAINTIFF IN ERROR,

vs.

W. A. TEMPLETON AND S. H. PEARCY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

INDEX.

	Original.	Print.
Caption	1	1
Oath *in forma pauperis*	1	1
Summons	2	2
Marshal's return	3	2
Declaration	3	2
Demurrer to declaration	10	7
Opinion	12	8
Judgment	15	10
Petition for writ of error, &c	15	10
Affidavit of poverty	16	11
Assignment of errors	17	12
Order allowing writ of error, &c	18	12
Certificate of judge as to question of jurisdiction	18	12
Clerk's certificate	19	13
Citation and service	20	13
Writ of error	21	14

Judd & Detweiler, Printers, Washington, D. C., December 16, 1901.

1 Be it remembered, that at a circuit court of the United States begun and held for the southern division of the eastern district of Tennessee, at the court-rooms in the city of Chattanooga, within said district and the sixth circuit, on the first Monday, it being the 7th day of October A. D., 1901. Present and presiding, the Honorable C. D. Clark, district judge. Among the proceedings had were the following, to wit:

THOMAS SWAFFORD, Plaintiff,
vs.
W. A. TEMPLETON, S. H. PEARCY, Defendants. } No. 698. At Law.

Be it remembered, that heretofore, to wit, on the second day of February, in the year of our Lord, nineteen hundred and one, came the plaintiff herein by his attorney, and filed in the clerk's office of the court aforesaid, his certain oath *in forma pauperis*, which said oath is clothed in the words and figures following, to wit:

Oath in Forma Pauperis.

I, Thomas Swafford, do solemnly swear that I am a citizen of the United States and of the State of Tennessee, and have been for a number of years last past, and that I am about to commence an action in the United States circuit court for the southern division of the eastern district of Tennessee at Chattanooga and because of my poverty I am unable to pay the costs of said suit or action or to give security for the same and that to the best of my belief I am entitled to the redress, by me sought in said suit or action, and that there is
2 no one else interested therein who is able to pay or secure said costs. Said suit is an action for damages against W. A. Templeton and S. H. Pearcy for wrongfully refusing me the right to vote and for declining to receive, take or deposit my vote or ballot and for registering the same, for a member of the U. S. Congress and presidential electors, all at the November election, 1900 in Rhea county, Tennessee.

his
THOMAS x SWAFFORD.
mark.

Sworn to and subscribed before me 2/1–1901.
W. B. MILLER,
Notary Public, Rhea County, Tenn.

Attest:
W. B. MILLER.
ALICE AYRES.

And on the same day, to wit, on the 2nd day of February, 1901, there was issued out of the clerk's office of said court, our certain summons, directed to the marshal of said district and against the defendants herein, clothed in the words and figures following, to wit:

Summons.

The President of the United States of America to the marshal of the eastern district of Tennessee, Greeting:

You are hereby commanded to summon W. A. Templeton, S. H. Pearcy if to be found in your district, to be and appear before the judges of the circuit court of the United States, in the sixth circuit, for the southern division of the eastern district of Tennessee at the Federal court-rooms in Chattanooga, in said State, on the first Monday in April next, then and there to answer Thomas Swafford in an action to his damage $2,500.00.

Herein fail not and have you then and there this writ.

3 Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States at Chattanooga, in the said district, the 2d day Feb'y in the year of our Lord 1901 and of our Independence 125th.

Court Seal of Feb'y.

HENRY O. EWING, *Clerk*,
By R. M. WATKINS,
Deputy Clerk.

Rec. Feb. 8—at Chattanooga, executed as commanded at Dayton, Rhea Co. Tenn., Feb. 12–13 1901.

C. W. McCALL,
Deputy Marshal.

Filed Feb. 22 1901.

HENRY O. EWING, *Clerk.*

And afterwards, to wit, on the 2d day of April, A. D. 1901, the following declaration was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Declaration.

In the U. S. Circuit Court in and for the Sixth Circuit, Sitting at Chattanooga, in the Southern Division of the Eastern District of Tennessee.

THOMAS SWAFFORD
vs.
W. A. TEMPLETON and S. H. PEARCY.

Declaration.

Thomas Swafford, a white citizen of the tenth civil district in Rhea county, in the division and State aforesaid, plaintiff herein, complains of defendants W. A. Templeton and S. H. Pearcy of a plea of damages, for—

That, heretofore, to wit, on the 6th day of November, 1900, plaintiff, a natural-born citizen of the United States and for more than thirty years last past a citizen and resident of the tenth civil district, in the county of Rhea in the southern division of the

eastern district of Tennessee, was a legally qualified voter and elector, possessing all the qualifications necessary to the elective franchise under the laws and Constitution of the United
4 States and under the constitution and valid laws of the State of Tennessee and was entitled to cast his ballot at the court-house voting precinct in said tenth district (it being the only voting precinct therein) and for a Congressman in the Fourth congressional district in Tennessee (said county being in the Fourth congressional district in Tennessee) and for presidential electors in and for said State at the general November election last. The defendants were a majority of a board of three election judges, appointed by the board of election commissioners in and for Rhea county to hold said election at the aforesaid court-house or voting precinct in said county, and the said board of election judges had the custody and control of the ballot-box used and the ballots deposited in said November election, and as such it was their legal duty to receive and deposit all legal ballots tendered by legally qualified electors on the occasion of said election; and plaintiff did, at the time aforesaid, offer to deposit his said ballot, he being a legal voter at the time, and tendered same to said board of judges, which was then and there wilfully, deliberately, wrongfully and illegally rejected by the defendants as a majority of said board of judges, and they declined to receive, deposit and count the same, over the protest of the plaintiff and of the third or minority member of said board of judges, for the reason that plaintiff, because of his illiteracy, was unable to read and write so as to select and mark the names of the candidates for Congress and presidential electors which he desired to vote for, and whose names, together with some thirty others, were printed on what is known as a Dortch-law ballot presented to plaintiff, and he was required, without assistance from any one, to select and mark the names of the persons he desired to vote for from thw whole number printed on said ballot; and being unable, because of his illiteracy aforesaid, so to do, plaintiff was by the defendants deprived of his right to vote, they insisting
5 that unless he, without any assistance, selected and marked the names he desired to vote for, as aforesaid, his ballot would not be received and he would not be allowed and was not allowed to vote.

Plaintiff then and there insisted to defendants that he was not bound to comply with the Dortch-law requirements and to vote or mark a Dortch-law ballot, but that he was entitled to vote independent of the Dortch-law requirements and the ballot contemplated by sections 1259–'60, Shannon's Code of Tennessee and in the legal manner required of voters not residing in territory of sufficient population to warrant the application of the Dortch law, to wit, in towns or civil districts of less than 2,500 population, according to the previous Federal census. Plaintiff offered to vote and was a legally qualified voter and was so held and admitted by defendants in all respects, except they insisted that he should comply with the Dortch-law requirements, for that, under the provisions of chapter 163, Acts of General Assembly of Tennessee for the Year

1899, the Dortch-law applied to the civil district in which plaintiff resided, as laid out by chapter 163, and plaintiff avers it to be a fact that if said chapter 163 be constitutional and valid, then that he was subject to the Dortch-law requirements, and defendants were right in the rejecting of his ballots, but he avers and insists that chapter 163 aforesaid was unconstitutional and invalid in this: That, at the time of passing chapter 163 and for some time prior thereto, the county of Rhea was composed of fifteen civil districts, regularly laid out in all respects pursuant to constitutional and statutory provisions of the State, by the county court of said county, the plaintiff residing in the tenth or court-house district, that none of said fifteen districts was of 2,500 or more population, nor was there a town in any of said districts of said population by the preceding Federal census; for purely partisan purposes and with no other end in view, the General Assembly of Tennessee, being of the opposite political complexion to that of
6 plaintiff and the great majority of voters resident in and of the territory constituting the third and fourth civil districts of Rhea county as laid out by chapter 163, and said General Assembly being of the same political complexion as the majority of voters residing in the first and second civil districts of said county as laid out by chapter 163, passed said legislative enactment (chapter 163 aforesaid) merging into each of the four civil districts as therein created, three or more of the former civil districts in said county of Rhea, and merging into the third civil district the original 5th, 6th, 7th, 9th and 10th civil districts and as laid out by said partisan legislative enactment, the third and fourth civil districts of said county were of more than 2,500 population each, while the first and second civil districts were of less than 2,500 each, and consequently under the laws of Tennessee then existing, the Dortch law as compiled sections 1231–1258 inclusive, Shannon's Code of Tennessee, would apply to the voters in the third and fourth civil districts, but not to those of the first and second districts of said county: this enactment as stated, was for purely partisan and political purposes and none other and with a view of depriving plaintiff and a large number of others of like situation and educational attainments, residents of the territory affected thereby, of the rights and privilege of voting: the effects of applying the Dortch law to said third and fourth civil districts and not to the first and second districts of said county was and is to reverse and overcome an adverse political majority of 250 in said county of Rhea and to make it the same political complexion as the legislature which passed chapter 163.

At the time of passing chapter 163 aforesaid, there were various other counties in and throughout the State of Tennessee substantially situated as Rhea county with substantially the same numerical population, area, wealth, and the population of which was of substantially the same character, wealth, social and educational attainments and in all other material respects similar to the population of Rhea county.

7 No legislation whatever, similar to chapter 163, was enacted with reference to the other counties similarly situated and circumstanced as Rhea; the civil districts as laid out by the county courts of such other counties, were left intact by the legislature, and the Dortch law did not and does not apply to the civil districts in such other counties, and as a consequence plaintiff avers and insists that said chapter 163 was class legislation, in violation of the Federal Constitution and was therefore void.

Again, no voting precincts were ever fixed in the district created by chapter 163, and the county court of Rhea county, subsequent to the passage of said enactment and some months prior to said November election, in regular session, passed a resolution to the effect that chapter 163 was invalid and class legislation and of no effect whatever, and that the former fifteen civil districts, together with the voting precincts therein, as previously fixed by said county court under the general laws and constitution of Tennessee, continued to exist, unaffected by chapter 163; but if said chapter 163 did operate to change said districts as formerly laid out, then that it (the county court of Rhea county) by chapter 163 could not be deprived of its right to change, alter and modify the civil districts in Rhea county, and it thereupon proceeded, by resolution, to re-establish the fifteen civil districts in said county and voting precincts in each district, all exactly as they existed prior to passing chapter 163, the court-house precinct aforesaid being the only voting precinct in said tenth district.

And plaintiff avers that at the time of passing chapter 163 the county courts of the remaining counties in Tennessee, many of which were substantially situated as Rhea, as aforesaid, as to population, area, etc., were left free to exercise the legal power and right to change, alter and modify civil districts and create new ones, and that the restriction placed on the county court of Rhea county,

8 as the representative of the people of said county in this matter, was class legislation and in this respect invalid and void.

No voting precincts were created by any authority in and for the four civil districts of said county, as laid out by chapter 163, but the election commissioners of said county advertised the November election aforesaid to take place in the four civil districts but in each of said civil districts at more than one voting precinct, designating and recognizing as the voting precincts fourteen of the fifteen precincts as formerly established by said county court, the court-house precinct aforesaid being one of the fourteen.

The plaintiff avers that it was and is far more expensive to hold elections under the Dortch and registration laws of Tennessee, applying to civil districts of more than 2,500 population, than to hold same independent thereof and that he (plaintiff) together with a large number of other citizens and residents of the territory comprised in the third and fourth civil districts of Rhea county, as defined by chapter 163, were tax-payers of said county and State and of the United States, as aforesaid, and that, as such tax-payers, they were compelled to contribute to the expenses incident to elec-

tions in said county of Rhea, which expenses have to be met from the treasury of said county, and that therefore the enactment of chapter 163 was special or class legislation, imposing upon the taxpayers of the territory composed in the third and fourth districts onerous burdens not imposed upon others in said State of like class and station.

Prior to said November election and subsequent to the passage of chapter 163 and the action of the county court of Rhea county aforesaid, the Federal census of 1900 was taken, compiled and published, in the doing of which the Department of the Interior and the Federal Census Bureau, each and both, declined and refused to conform to chapter 163, for the reasons before stated, and
9 instead recognized fifteen civil districts as laid out by the county court aforesaid, and in none of which was there by said last Federal census nor any previous Federal census as many as 2,500 population.

Plaintiff bore arms in the late civil war in support of the United States Government, and prior to and ever since has enjoyed the elective franchise and did so prior to the adoption of the fourteenth amendment to the Federal Constitution, and avers that by its adoption and by the adoption of sections 5, 8 and 17 of article 1, section 1 of article 4 and sections 8, 16 and 11 article 11 of the constitution of Tennessee, existing at the time of the adoption of said 14th amendment to the Federal Constitution, he (plaintiff) became and was possessed of the right of suffrage as an immunity or privilege of citizenship, of which he could not be deprived by the enactment of chapter 163 under the circumstances aforesaid.

Plaintiff presented his ballot at the time and in the manner required by law, and did all things else necessary to enable him to exercise the elective franchise in the civil districts of less than 2,500 population, and the defendants admitted and conceded that he was entitled to vote, except that he should select and mark the name of the candidate for Congress and the names of the presidential electors and other persons for whom he desired to vote as required by the Dortch law in Tennessee, and that he plaintiff, must do so without assistance of any kind, which he (plaintiff) altho' a man of good eyesight and no physical disability, was unable to do, because of his illiteracy and altho' he had repeatedly attempted to learn to read and write sufficiently to enable him to do so.

The facts and circumstances hereinbefore charged were well known to defendants, and plaintiff then and there insisted by himself and his counsel that chapter 163 aforesaid was unconstitutional and invalid, by reason of all the facts and circumstances
10 aforesaid, and that he (plaintiff) was entitled to vote independent of the Dortch-law requirements, all of which was denied to him, and his vote was declined and not counted and his ballot was not received by defendants as a majority of said board of judges, all to plaintiff's damage the sum of $2,500, exclusive of interest and costs.

Wherefore plaintiff sues and alleges that the matter in controversy arises under the laws and Constitution of the United States

and is of the character cognizable by this court and of over $2,000 in amount, exclusive of interest and costs, and plaintiff demands a jury to try the cause.

BURKETT, MILLER & MANSFIELD,
Attorneys for Plaintiff.

And afterwards, to wit, on the 16th day of April, 1901, came the defendants and filed their certain demurrer to the declaration herein, which said demurrer is in the words and figures following, to wit:

Demurrer.

In U. S. Circuit Court, Chattanooga, Tennessee.

THOMAS SWAFFORD
vs.
W. A. TEMPLETON & S. H. PEARCY.

Demurrer of defendants, W. A. Templeton & S. H. Pearcy, to the declaration in said case.

Said defendants demurr to said declaration because

(1.) The declaration shows that these defendants merely acted as sworn officers of the State, being two of the three election judges appointed by law to hold said election and that the plaintiff was allowed by said judges, the same privilege and the same opportunity as a citizen and voter to cast his vote which was allowed other citizens in said civil district. The declaration does not allege that defendants acted maliciously or made any discriminations
11 against the plaintiff or denied him any right which the law of the State under which defendants were appointed and which they were sworn to execute accorded to other citizens and voters of said civil district.

(2.) The declaration shows that the plaintiff was a citizen of the civil district constituted by law under chapter 163 of the act of the assembly of Tennessee of the year 1899. This said civil district was of a population of 2,500 or more, that defendants and one other were appointed by law as election judges to hold said November election for the year 1900 for said civil district where the plaintiff resided. The declaration shows on its face that the plaintiff was not denied the right to vote as a citizen and voter of said election district, but was accorded the right and opportunity to vote, the same as other citizens and voters of said civil district and that the failure of the plaintiff to vote was because he could not comply or declined to comply with the requirements of said law.

(3.) The declaration shows that said civil district in which the plaintiff resided was constituted by said act of the assembly for the year 1899 and that said election was held under the provisions of said act. The allegation in said declaration that said act of the assembly was annulled and repealed by the county court of Rhea county must be taken as nugatory, inasmuch as said county court is not entitled by law to repeal or annul an act of the assembly of

the State of Tennessee. The plaintiff's only claim that he was denied the right to vote, is based upon his allegation that said act of assembly was repealed and annulled by said resolution of the county court of Rhea county.

(4.) The declaration shows no damage to the plaintiff and no injury inflicted upon him by defendants. There is no allegation that defendants did anything to interfere with the plaintiff's alleged right to vote, except merely to insist that the plaintiff should comply with the law of the State under which said election was held and under which defendants were acting.

(5.) The declaration shows no election except the one held
12 under said act of 1899, chapter 163,—it shows that defendants and judges of said election, faithfully and without malice enforced the provisions of the law under which they were appointed and sworn and for this they are not liable in damage to plaintiff.

Whereupon the defendant demurs and prays judgment.

TEMPLETON & CARLOCK, *Sol's.*
A. P. HAGGARD, "

We certify that in our opinion the foregoing demurrer is well founded.

TEMPLETON & CARLOCK,
A. P. HAGGARD, *Sol's.*

STATE OF TENNESSEE, }
Rhea County. }

Personally came W. A. Templeton & S. H. Pearcy and made oath in due form of law that the foregoing demurrer is not interposed for delay.

S. H. PEARCY.
W. A. TEMPLETON.

Subscribed and sworn to before me this 15th April, 1901.

W. L. GIVENS,
[SEAL.] *Notary Public.*

And afterwards to wit, on the 30th day of April, A. D. 1901, the Honorable C. D. Clark, district judge filed an opinion in said cause which said opinion is clothed in the words and figures following, to wit:

Opinion.

THOMAS SWAFFORD
v.
W. A. TEMPLETON ET AL. } Eastern District Tenn. Decided April 30th, 1901.

The demurrer in this case does not raise what it seems to me is the most serious objection to the suit, namely the question of
13 jurisdiction. The demurrer may possibly be construed as presenting that issue, but it is doubtful. The plaintiff does not content himself with the averment that he was wrongfully and maliciously or illegally deprived of the right to vote in a national

election, accompanied with the further averment that he was qualified to vote under the Constitution and laws of the United States and of the State of Tennessee, so as to bring the case within the ruling in Wiley *v.* Sinkler, 179 U. S., 61.

On the contrary the declaration goes further than this and avers specifically and throughout impliedly shows, that the plaintiff was denied no right secured to him under the Constitution and laws of the United States, but on the contrary avers that his right to vote was fully acknowledged, provided he would comply with the statute of the State called the Dortch law, which regulates the exercise of the elective franchise in this State. It is distinctly averred and is plainly evident, that plaintiff was denied the right to vote because he expressly refused to comply with this statute of the State called the Dortch law, upon the ground that an act of the General Assembly, chapter 163 of the act of 1899, extending the Dortch law to the district of plaintiff's residence, is unconstitutional as applied to the district in and the precinct at which the plaintiff was attempting to vote. The action in nowise depends upon the theory or proposition that the Dortch law in its general application is unconstitutional. On the contrary the constitutionality of the act has been declared by the supreme court of the State, (Cook *v.* State, 90 Tenn., 408), and such a conclusion is accepted by the courts of the United States, Mason *v.* Missouri, 179 U. S., 348.

The plaintiff's suit proceeds distinctly upon the grounds: First, that he was denied the right to vote because of a failure to comply with the Dortch law and second, that the special act of the legislature, chapter 163 of the act of 1899, extending the Dortch law to the district of which the plaintiff is a citizen is unconstitutional. The alleged invalidity of the act is based upon its supposed conflict with
14 the constitution of the State, and not with the Federal Constitution. The special statute attending the Dortch law to the district of which plaintiff is a citizen is not only not alleged to infringe any provision of the Constitution of the United States, but it is perfectly obvious that the statute is valid so far as any provision of the Federal Constitution is concerned. The statute of the State makes no discrimination against the plaintiff on account of the attempt to exercise any Federal right whatever, nor did the registration commissioners discriminate against the plaintiff, or undertake directly or indirectly to deny or invade any Federal right or immunity. In regard to the exercise of the elective franchise the plaintiff stood exactly on an equal footing with every other citizen of his district, and if plaintiff's action can be successfully prosecuted, it is not because of any rights secured to him by the Constitution of the United States but on account of rights secured to him by the constitution of the State, namely protection against special or class legislation.

As the declaration sets out specifically and fully the issue, and the only issue, involved in the case and on which the action proceeds, it clearly appears that there is no Federal question, and that this court is without jurisdiction, and unless the action really and substantially involves a Federal question, the court is without juris-

diction or power to entertain the suit. The action must be one which really and substantially involves a Federal question before the court may entertain jurisdiction of a case, which must turn on a question which is clearly non-Federal in its nature.

The suit is accordingly dismissed with costs. The demurrer construed as raising this issue is well taken, but it is so doubtful whether it presents the question on which the suit is dismissed, I desire the entry to show that the suit is dismissed upon the demurrer, as well as by the court of its own motion. From this ruling the writ of error must be prosecuted direct to the Supreme
15 Court of the United States, as the dismissal is on the sole ground that there is no Federal question involved, and the court is therefore without jurisdiction.

CLARK, *J.*

And afterwards, to wit: on the first day of May, A. D. 1901, an entry was made upon the jo-rnal of said court, which said entry is clothed in the words and figure- following to wit:

Entry.

Journal G, page 198.

THOMAS SWAFFORD
vs.
W. A. TEMPLETON ET AL. } No. 698.

This cause came on for hearing upon the demurrer to the declaration, which being fully understood by the court is sustained. And it is ordered that the suit be dismissed and plaintiff pay all costs for which execution is awarded.

The dismissal being solely on the want of jurisdiction.

And afterwards to wit: on the seventh day of November, A. D. 1901, there was filed in the clerk's office a petition for writ of error and oath *in forma pauperis*, clothed in the words and figures following, to wit:

In the Supreme Court of the United States, at Washington, D. C.

THOMAS SWAFFORD
vs.
W. A. TEMPLETON ET AL.

Petition of Thomas Swafford in Above Cause.

To the honorable judges of the United States Supreme Court:

Now comes Thomas Swafford, plaintiff in error, and petitions this honorable court to allow writ of error to be directed to the circuit court of the United States for the southern division of the eastern district of Tennessee, to remove this cause to the Supreme Court of the United States at Washington, D. C., for a review thereof,
16 the record in the case lately pending in said court below, wherein above-named Thomas Swafford, plaintiff in error,

was plaintiff, and the above-named defendants in error were defendants, and particularly the record of the judgment rendered by said circuit court in the said cause, wherein the said court below sustained the demurrer of the defendants to the complaint of the plaintiff and dismissed the plaintiff's said cause at his costs, and declined to take and entertain jurisdiction of this cause, for what it conceived want of legal jurisdiction by said circuit court; and said judgment was duly entered on record therein on the 1st day of May, 1901; that plaintiff be allowed to perfect this appeal without filing the bond, as required by law, and without costs and fees of the clerk or other officers of this court, upon his affidavit made and filed in this cause according to law,

Your petitioner respectfully states that he has this day filed herewith his assignment of errors, committed by the court below in said cause and intended to be urged by your petitioner and plaintiff in error in the prosecution of this his suit in error.

BURKETT, MILLER & MANSFIELD,
Attorneys for Plaintiff in Error.

I, Thomas Swafford, do solemnly swear that I am a citizen of the United States and of the State of Tennessee, and have been for a number of years last past and that I am about to sue out a writ of error from the Supreme Court of the United States to correct a judgment rendered against me in the circuit court of the United States at Chattanooga, Tennessee in the case of myself against W. A. Templeton *et als.*, and because of my poverty, I am unable to pay or secure the costs of said writ of error or action or to give security for the same, and that to the best of my belief, I am entitled to the redress by me sought by said writ of error or action and that there is no one else interested therein who is able to pay or secure said costs.

Said suit is an action for damages against W. A. Templeton and S. H. Pearcy for wrongfully refusing me the right
17 to vote and for declining to receive, take or deposit my vote or ballot for a member of the United States Congress and presidential electors at the November election, 1900, and for rejecting same, all in Rhea county, Tennessee.

his
THOMAS x SWAFFORD.
mark.

Subscribed and sworn to before me this 30 day of October, 1901.

[SEAL.] M. B. HICKS,
Notary Public.

And on the same day, to wit: on the seventh day of November, A. D. 1901, there was filed in the clerk's office of said court an assignment of errors, clothed in the words and figures following, to wit:

In the Supreme Court of the United States.

THOMAS SWAFFORD
vs.
W. A. TEMPLETON ET AL.

Assignment of Errors.

The plaintiff in this action, in connection with his petition for writ of error, makes the following assignment of errors, which he avers exists:

(1.) The court erred in sustaining the demurrer of the defendants.

(2.) The court erred in dismissing plaintiff's suit.

(3.) The court erred in conceiving that no Federal question was involved.

(4.) The court erred in conceiving that it was without jurisdiction or power to entertain the suit.

(5.) The court erred in dismissing the suit of its own motion.

BURKETT, MILLER & MANSFIELD,
Attorneys for Plaintiff.

18 And on the same day to wit: on the seventh day of November, A. D., 1901, an entry was made on the journal of said court which said entry was clothed in the words and figures following, to wit:

Entry.

Journal G, page 292.

On the petition, assignment and affidavit of Thomas Swafford, it is ordered that writ of error from the Supreme Court of the United States, issue to have reviewed in said Supreme Court the final decree heretofore filed and entered herein and same is hereby allowed and that a certified transcript of the record and all proceedings therein be forthwith transmitted to said United States Supreme Court and plaintiff having taken the oath prescribed for poor persons, such writ of error will be allowed, record transmitted and proceedings had without costs or fees of clerk or other officers of said Supreme Court of United States and the circuit court, from which said proceedings and cause are removed.

Dated at Chattanooga, this Oct. 31, 1901.

C. D. CLARK, *Judge.*

And on the same day to wit: on the seventh day of November, A. D., 1901 a certificate of the judge was filed in the clerk's office of said court, which said certificate was clothed in the words and figures following, to wit:

In this cause I hereby certify that the order of dismissal herein made is based solely on the ground that no Federal question was involved, and that the declaration, in my opinion, disclosed the infraction of no right arising under or out of the Federal laws or

Constitution; and that treating the demurrer as presenting this question of jurisdiction, and acting also independently of the demurrer, and on the court's own motion, the suit is dismissed
19 only for the reasons above stated; that is, that the controversy, not arising under the laws and Constitution of the United States, there is consequently no jurisdiction of the circuit court of the United States.

This certificate is made conformably to act of Congress of March 3, 1891, chapter 517, and the opinion filed herein April 30th, 1901, is made a part of the record and will be certified and sent up as a part of the proceedings, together with this certificate.

This 9th day of November, 1901.

C. D. CLARK,
Judge Holding the Circuit and District Courts at Chattanooga, Tenn.

THE UNITED STATES OF AMERICA,
Eastern District of Tennessee, Southern Division, } *ss:*

I, Henry O. Ewing, clerk of the circuit court of the United States of America, within and for the district aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above-entitled cause, as the same appears of record and on file in the clerk's office of said court.

Seal Circuit Court of the United States, Eastern District of Tennessee.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Chattanooga, Tennessee, this 22nd day of November, A. D. 1901.

HENRY O. EWING, *Clerk.*

20 UNITED STATES OF AMERICA, *ss:*

The President of the United States to W. A. Templeton and S. H. Pearcy and their attorneys, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from the date of this writ, pursuant to a writ of error, filed in the office of the clerk of said Supreme Court, wherein Thomas Swafford is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 8th day of Nov., 1901, and of the Independence of the United States the one hundred and twenty-sixth.

C. D. CLARK,
United States District Judge, Presiding in the Circuit Court at Chattanooga, Tennessee.

Attest: HENRY O. EWING, *Clerk.*

[Endorsed:] Service hereof acknowledged and copy received on this Nov. 8, 1901. Templeton & Carlock, att'ys for W. A. Templeton. W. L. Givens, att'y for S. H. Pe-rcy.

21 *Writ of Error.*

United States Supreme Court.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Thomas Swafford, plaintiff and W. A. Templeton — S. H. Pearcy defendants a manifest error hath happened, to the great damage of the said Thomas Swafford as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court together with this writ, so that you have the same at Washington in said circuit, on the * 7th day of December next, in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 8th day of November in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States of America the one hundred and twenty-sixth.

Seal Circuit Court of the United States, Eastern District of Tennessee.

HENRY O. EWING,
Clerk of the Circuit Court of the United States, East. Dist. of Tennessee.

Allowed by
C. D. CLARK, *Judge.*

---

* Not exceeding 30 days from the day of signing the citation.

[Endorsed:] Filed Nov. 7, 1901. Henry O. Ewing, clerk.
Endorsed on cover: File No. 18,340. E. Tennessee C. C. U. S. Term No. 487. Thomas Swafford, plaintiff in error, *vs.* W. A. Templeton and S. H. Pearcy. Filed December 6th, 1901.

No. 487.

Office Supreme Court U. S.
FILED
MAR 22 1902
JAMES H. MCKENNEY,
Clerk.

By. J. Mansfield for C. C.

Filed Mar. 22, 1902.

Assignment and Brief of Plaintiff (Appellant).

SUPREME COURT OF THE UNITED STATES.

No. 187.

THOMAS SWAFFORD, PLAINTIFF IN ERROR.

vs.

W. A. TEMPLETON AND S. H. PEARCY.

(18,340.)

THOMAS SWAFFORD
vs.
A. TEMPLETON AND S. H. PEARCY.

In the Supreme Court of the United States.

STATEMENT.

In presenting this case, we shall first call attention to GENERAL Statutory and Constitutional provisions of nnessee regarding the laying out of civil districts and owing Justices of the Peace in the various Counties of State; this will be followed by such provisions affect- the elective franchise and also relating to class legis- on: we will conclude the statement with the case in id.

Counties, Civil Districts and Justices.

Prior to the Tennessee Constitution of 1834, the Coun- of the state were not divided into civil districts. The anization of the State and Counties partook somewhat he military form. For instance, the first constitution vided that there should be "Justices of the Peace ap- nted for each county, not exceeding two for each Cap- n's company, except for the company which includes County Town, which shall not exceed three, who shall d their offices during good behavior."

Const. 1796, Art. 5, Sec. 12.

This arrangement continued until changed by the nstitution of 1834, which was as follows:

"The different counties in this state shall be laid off, as the General Assem- may direct, into districts of convenient size, so that the whole number in each nty shall not be more than twenty five, or four for every hundred square s. There shall be two Justices of the Peace and one Constable elected in district by the **qualified voters** therein, except districts including county ns, which shall elect three Justices and two Constables."

Const. 1834, Art. 6, Sec. 15.

Pursuant to this latter provision, it was enacted by the FIRST SUCCEEDING LEGISLATURE:—

"That there shall be appointed by joint resolution of both branches of the General Assembly five suitable persons as Commissioners in each county in this State, a majority of whom shall be competent to act to lay off the respective counties into districts of convenient size, **regard being had both to territory and population,** for the purpose of electing Justices of the Peace and Constables therein. * * * That the Commissioners aforesaid * * * shall have full power and authority to lay off their counties into districts for the purpose aforesaid; and, in laying off the same, shall be governed by the following **ratio of population,** towit: Each county, containing 3,000 qualified voters or upwards, twenty-five districts; each county containing 2 500 voters and upwards, twenty districts; each county containing 2,000 voters and upwards, seventeen districts;" * * * and so on down "to counties containing less than 700 voters, which shall be laid off into eight districts."

Acts Tenn. 1835, Ch. 1, Secs. 1–3.

The aforesaid constitutional and legislative provisions were carried into subsequent constitutions and statutes, and are the constitution and law of Tennessee today.

Const. 1870, Art. 6, Sec. 15.
Code of 1858, Secs. 76–9.
Shannon's Code, Secs. 94–7.

Upon the adoption of the Constitution of 1834, and passing of the Acts of 1835, there were only sixty-seven counties in Tennessee. And by the Constitution of 1834, these counties then existing were to be laid off into civil districts "AS THE LEGISLATURE MAY DIRECT."

Under the Act of 1835, Chapter 1, Commissioners had been appointed, whose duty it was to lay off the sixty-seven counties aforesaid into civil districts, ACCORDING TO POPULATION, each county being given civil districts in proportion to its population. This was by GENERAL LAW and preserving exact equality among them all. Rhea county was one of the sixty-seven thus laid off. And it so remains as a sub-division of the state.

Code of 1858, Sec. 75.
Shannon's Code, Sec. 92a.
Acts 1807, Ch. 9.

At the time of adopting the Code of 1858, seventeen

new counties had been created, making the total number eighty-four.

Code 1858, Secs. 76-9.
Shannon's Code, Secs. 94-7.

The Commissioners, appointed to lay off the original sixty-seven counties, having performed their duties prior to the creation of the new counties, there was consequently no provision for dividing the seventeen new counties into districts. Therefore, by the Code of 1858 it was provided:

"The County Court of any County, two-thirds of the acting Justices of the Peace being present, may change the boundary of any civil district and make new districts, or re district a County entirely, when necessary, by means of Commissioners to be appointed by such Courtor otherwise."

Code 1858, Sec. 78.

It was further provided:

"The districts already laid off in the several counties of the State shall continue until altered in the manner pointed out by law."

Code 1858, Sec. 77.

"The manner pointed out by law" was by the County Courts, as shown by Section 78, just quoted above.

It was further provided that all counties should be divided into civil districts, ACCORDING TO POPULATION, thereby preserving perfect equality. These Statutory provisions continue to the present day.

Shannon's Code, Secs. 94-7.
Code 1858, Sec. 79.

A Justice of the Peace is a constitutional, judicial officer. The justices of the county, two elected from each civil district, except those including county towns, which were entitled to three, as before shown, compose the county courts of the various counties. This county court was created for each and every county in the State, and so exists to the present time.

Const. 1870, Art. 6, Sec. 1.
Code 1858, Secs. 127–8
Shannon's Code, Secs. 221–2.

These County Courts, composed of the various Justices

are the Probate courts of the state. They constitute the tax levying power, administer insolvent estates, have cognizance of guardianships, administrator's settlements, public roads, public schools, THE CHANGE OF DISTRICT LINES and possess many other functions, and cannot be abolished by Statute, being Constitutional courts.

Code 1858, Secs. 78, 488, 4,201.
Shannon's Code, Secs. 96, 648, 6,027.

"The County Court is one of the institutions of this State recognized in the Constitution, and the powers conferred by the Constitution upon the Justices of the Peace in their collective capacity are intended to be exercised in the County Court * * * and cannot be taken away from the Justices of the Peace by any special or local law, and conferred on local tribunals of particular counties."

Pope vs. Phifer, 3 Heis., 683.

Elections and Class Legisilation.

"Elections shall be free and equal, the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon a conviction by a jury of some infamous crime previously ascertained and declared by by law, and judgment thereon by a Court of competetent jurisdiction."

Const. 1870, Art. 1. Sec. 5.

"Every male person of the age of twenty-one years, being a citizen of the United States, and a resident of this State for twelve months, and of the county wherein he may offer his vote for six months next preceding the day of election, shall be entitled to vote for members of the General Assembly * * * and there shall be no qualification attched to the right of suffrage, except that each voter shall give to the Judges of Election, where he offers to vote, satisfactory evidence that he has paid the poll taxes assessed against him for such preceding period as the Legislature shall prescribe, and at such time as may be prescribed by law."

Const. 1870, Art. 4, Sec. 1.

"In Tennessee, the elective franchise **is a right** which the law protects and enforces as jealously as it does property in chattles or lands. * * * The person who, under the Constitution and Laws of the State, is entitled to it, has a property in it which the law maintains and vindicates as vigorously as it does any right of any kind which men may have and enjoy.

"The rules of law, which guard against deprivation or injury to the rights of persons in corporeal properties, are alike and equally applicable to the elective franchise; and alike and equally guard persons invested with it against deprivation or injury to it. Persons invested with the elective franchise cannot be deprived of it otherwise than 'by due process of law,'"

State vs. Wm. Staten, 6 Cold. 233.

Prior to the passage of what are known as the Dortch and Registration Laws of Tennessee, the ballots to be voted at ALL ELECTIONS were to be of "plain white paper, three inches wide and seven inches long, with the name or names to be voted for plainly written or printed thereon."

Shannon's Code, Sec. 1259.
Code of 1858, Secs. 846–9.

In 1891 the Legislature passed what are known as the Dortch and Registration Laws, requiring the registration of voters "in all cities, towns and **civil districts** having a population of twenty-five hundred inhabitants or over that number, computed by the Federal Census of 1890, or that may hereafter have that number or over, computed by any subsequent Federal Census."

It was further provided with reference to **all elections** to be held in such districts, towns and cities that the ballots be printed and distributed at **public expense**; the names of candidates to be printed together, irrespective of party, the arrangement upon the ballot to be left to the **will** of the officer charged with the printing of the ballots; that these ballots shall be distribted by the officer holding the election; that voting booths, shelves, etc., shall be erected at public expense at the various polling places, subject to the statutory provisions aforesaid; that every voter shall place a cross (x) opposite the name of the candidate of his choice on the ballot given him, and shall then fold the ballot in a peculiar manner, so as to expose certain words and names on the ballot and so as not to expose certain other names thereon, and deliver same to the election officer.

Shannon's Code, Secs. 1248–9, 1245, 1238, 1231, 1189.

A retinue of election Registrars, Judges, Clerks and other officers is provided for, who are to be paid at public expense in such cases.

Shannon's Code, Secs. 1189, 1192–4. 1197, 1201, 1208, 1217–18.

The expense incident to erecting booths, printing ballots, registration books, paying registrars, etc., IS CONSIDERABLE GREATER where elections are held under the Dortch and Registration Laws, and is borne by the tax payers out of the County Treasury of the various Counties in which such elections are held.

Shannon's Code, Secs, 1208, 1231.
Record p. 5.

Also a pernon who cannot read and write, thus enabling him to properly mark and with technical discrimition properly fold his ballot, cannot vote the ballot contemplated, known as the Dortch Law ballot. and unless physically disabled is allowed no assistance.

Shannon's Code, Secs. 1248–9, 1255.

By the Tennessee Constitution of 1870. it is previded:

"The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general law of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunities or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law."

Const. 1870, Art. 11, Sec. 8.

'No man * * * man shall be in any manner deprived of his life, libert, or property but by the judgment of his peers or the law of the land."

State Const. Art. 1, Sec. 8.

"Unnrtural, arbitrary and capricious" legislation is not the 'Law of the Land." "Law of the Lrnd means a law which embraces all persons who are or may come into like situation and circumstances."

89th Tenn. 541–2.

THE PRESENT CASE.

By Chapter 13 Acts 1897, a partisan measure, the power to hold and certify elections and appoint Judges was taken from the Sheriffs and County Courts of a certain class of Counties in the State, including Rhe (all the coutties except those above 70,000 population) and placed in the hands of three Election Commissioners in each County. The Governor was given power to appoint these Commissioners. A majority of the Election Commissioners, so appointed, was given powet to name the Election Judges and officers, for the purpose of holding elections of all kinds.

The defendants were a majority of the Judges named by the Election Commissioners for the purpose of holding the November, 1900, election, and were in sympathy with the measure under which they were acting, rnd the other legislation presently to be referred to.

Record, p. 5.

In 1899 Rhea County had fifteen civil districts, it having been divided into districts by Commissioners, according to the General Law, having reference to population and the presvation of equality.

The County was entitled, by reason of its fifteen civil districts, to a County Court composed of thirty-one Justices and possessing, among other things, power to change, alter or modify the district lines of the County. This was not true of Rhea County only, but of **every cther County** in the State.

Shannon's Code, Secs. 94–7.
Record, p. 4.

At that tin e there was neither a town or civil district in the County of Rhea of 2,500 population, and the Dortch Law did not apply to any portion of Rhea County, and all elections were held independent thereof in the inexpensive manner usual in sparsely populated territory, and the vo-

manner usual in sparsely populated territory, and the voter was not required to mark or read his ballot, and could obtain assistance in selecting the ballot he desired to vote.

Record, pp. 4–5.

With apparently no reason therefor, but arbitrarily, it would seem (and the declaration avers for purely partisan purposes) the Legislature of Tennessee in 1899 singled out Rhea County alone from the other ninety-five Counties in the State, and proceeded to enact that it (Rhea Co.) should be divided into four civil districts only, thus reducing the representation of its citizens in its County Court from thirty-one to nine members, and provided that the County Court of Rhea County should not have power to change the lines of the Fourth Civil District in Rhea County, as laid out by the Legislature, but that the lines of said Fourth District should remain as laid out by the Legislature until changed by the Legislature itself. The County Court was left free to change the other three districts.

Acts 1899, Chapter 163, Sec. 2.
Record, pp. 3–4.

By the passage of Chapter 163 Acts 1899 aforesaid three or more of the original fifteen districts were massed into each one of the Legislative Districts and, as a result, the Third and Fourth Legislative districts were made of more than 2,500 population each, being some ten miles in width and eighteen miles in length. By this method the Dortch Law was applied to these two Legislative districts, and the voters therein would consequently be required to vote the Dortch Law ballot, as previously explained.

The plaintiff resided in the Tenth Civil District of the County, as existing prior to the passage of Chapter 163 aforesaid, which territory was included in the Third District as laid out by said Act, was an illiterate, white, tax-paying citizen, duly qualified to vote under the Laws and Constitution of the United States and of Tennessee, and had been so for a long number of years, and could have vo-

ted the ballot prescribed by law in all territory throughout the State, except that to which the Dortch Law was applicable. Because of his inability to read and write, he could not after dilligent effort mark the Dortch Law ballot and fold it with the technical nicety required. Consequently if Chapter 163 aforesaid was upheld and enforced plaintiff would be disfranchised.

Record, pp. 2–6-

The declaration alleges that plaintiff was a tax payer, and that expenses incident to holding Dortch Law elections were greater than if held independent of the Dortch Law; that such expenses were paid from the County Treasury and plaintiff with other taxpayers was required to bear this increased burden.

That "there were various other Counties in and throughout the State of Tennessee, substantially situated as Rhea County, with substantially the same numerical population, area and wealth, social and educational attainments, and **in all other material respects** similar to the population of Rhea County. No legislation whatever, similar to Chapter 163, was enacted with reference to the other Counties, similarly situated and circumstanced as Rhea."

That the County Court of Rhea County ignored Chapter 163, and proceeded to re-establish the fifteen civil districts in the County, as they existed prior to the passage of Chapter 163; that the Federal Census Bureau and the Department of the Interior had declined to recognize the action of the Legislature, but had recognized fifteen civil districts as existing in the County, and taken the census accordingly; that the Legislative Enactment aforesaid was class, vicious and arbitrary legislation, violative of that portion of the Fourteenth Amendment to the Federal Constitution prohibiting the denial by a State to any person within its jurisdiction "the equal protection of the laws," and also of that clause of the State Constitution previously quoted, prohibiting "class legislation."

That plaintiff presented himself at said election, and tendered a ballot, complying with legal requirements in Tennessee in territory not regulated by the Dortch Law, and demanded the right to vote the same, and made known to the defendants (a majority of the Election Judges) each and all the aforesaid facts, his contention with reference thereto and his reasons therefor, and was then and there by the defendants, "willfully, deliberately, wrongfully and illegally" deprived of his right to vote for a Congressman in the Fourth Congressional District, and for Presidential Electors, the defendants insisting that under Chapter 163 aforesaid, making the Third Legislative District of more than 2,500 population, plaintiff was required to vote a Dortch Law ballot or not vote at all; while plaintiff contended he was not required to vote a Dortch Law ballot, because Chapter 163 was unconstitutional and viod, being in violation of both State and Federal Constitutions; but, if it was not, then that the County Court of Rhea County had the right to re-district the County as to all territory except that comprised in the Fourth Legislative District, and, having re-districted the territory in which plaintiff resided, (the Third Legislative District) it was no longer under the Dortch Law. Plaintiff therefore sued in the Circuit Court, Eastern District of Tennesse, for Two Thousand Dollars damages.

Record, pp. 2–7.

The defendants demurred becaused it was not alleged that they acted maliciously, and in effect insiting on the legality of Chaprer 163 aforesaid. The demurrer was sustained, being construed by the Court as presenting the ground that "no Federal question was involved, and the Court therefore without juricdiction." The Court, in addition, of its own motion, held that no Federal question was presented, and accordingly dismissed the suit, "the dismissal being solely on the want of jurisdiction."

Record, pp. 7–10.

The Judge also certified "that the order of dismissal was based solely on the ground that no Federal question was involved, and that the declaration disclosed the infraction of no right arising under or out of the Federal Laws or Constitution."

A writ of error was allowed (record 10–11), the plaintiff having filed an assignment of the following five errors to the action of the court.

Record, pp. 12–13.

ERRORS.

(1) "**The Court erred in sustaining the demurrer of the defendants.**

(2) **The Court erred in dismissing plaintiff's suit.**

(3) **The Court erred in conceiving that no Federal question was involved.**

(4) **The Court erred in conceiving that it was without jurisdiction or power to entertain the suit.**

(5) **The Court erred in dismissing the suit of its own motion.**"

ARGUMENT AND BRIEF.

The above assignment raises practically one question, namely: Does the declaration present a federal question? We think so. If correct as to this the cause must be remanded.

"The right to vote for members of the Congress of the United States has its foundation in the Constitution of the United States."

Wiley vs Sinkler, 179 U. S., 58.
Ex parte Yarbrough, 110 U. S., 651.

The elective franchise in Tennessee is a **property right** and is protected and enforced as other rights, and a person once invested with it "can only be depriyed of it by 'due process of law.' "

The State vs. Wm. Staten, 46 Tenn., 233. (6 Cold.)

The declaration in substance avers the plaintiff was deprived of this constitutional right otherwise than by "due process of law," and we think states clearly a case of federal jurisdiction. But regardless of whether the elective franchise be "property," a voter cannot be deprived of it by "arbitrary class legislation;" and, being a privilege given by the Federal Constitution, any abridgement or encroachment thereon by State legislation must be constitutional from both a State and Federal standpoint.

Now, that the elective franchise in Tennessee is protected from class legislation and can only be abridged by general legislation applicable alike to all territory throughout the State of the same class or character, does not admit of doubt. It was only because of the Dortch Law being general that it was upheld.

Shannon's Code, Secs. 1189, 1231.
The State vs. Wm. Staten, 46 Tenn., 233. (6 Cold.)
Cooke vs. State, 90 Tenn., 407.
Sec. 3, Ch. 13, Acts of 1897.

It is equally clear that Chapter 163 Acts 1899, dealing alone with Rhea County and massing together three

or more of the original civil districts into one extensive, sparsely settled district, while there were various other Counties throughout the State of a similar class in "all material respects" to Rhea, not legislated upon, is arbitrary, vicious and class legislation.

This especially so when we reflect that since the admission of Tennessee as a State, the civil districts of her counties throughout the State had been moulded and existed upon the theory of equality in burden of taxation, equality of representation in the County Courts, which were the respective miniature legislative bodies of the various counties, and entrusted with the tax-levying power therein. Each of these miniature legislatures was composed of Justices of the Peace coming from civil districts laid off, having reference to ratio of population, as before shown.

The County Courts thus created, representation therein and the tax-levying and other functions thereof, have been preserved by the Constitution, Laws and Decisions of Tennessee since its statehood. (3 Heisk.)

Pope vs. Phifer, 59 Tenn., 683.

The counties had been divided into civil districts, originally, in the same manner, and the districts laid off according to population; they were given equal representation in the County Courts; these Courts, throughout the State, were entrusted with the changing of district lines, creation of new civil districts, and given the same general power with reference to these matters. Therefore, when the Dortch Law was passed, applying to all counties, towns and civil districts of a certain class or population, it was properly construed as general and not special legislation, and, consequently, was upheld.

Cooke vs. State, 90 Tenn., 407.

But, manifestly, it would not have been upheld if one or more counties of the State had been singled out and the Dortch Law applied to them, without reference to class; this because the application of the Dortch Law increased the expense of County government, the cost of holding

elections, and practically deprived illiterate persons of the elective franchise, which, in Tennessee, is a "right protected by law."

Pope vs. Phifer, 59 Tenn., 683, (3 Heisk.)
State vs. State, 46 Tenn., 233. (6 Cold.)
R. R. vs. Ellis, 165 U. S., 154–6.

The Circuit Judge was of the opinion that no federal question was presented, because the plaintiff did "not content himself with the averment that he was wrongfully, maliciously or illegally deprived of the right to vote in a national election," so as to bring himself within the ruling in Wiley vs. Sinkler, but that he went further and based his action on the supposed invalidity of Chapter 163 Acts of Tennessee 1889, which enactment, if invalid at all, was because of its intringement of that portion of the Constitution of Tennessee against class legislation. He thought plaintiff's action could be prosecuted, if at all, "not because of any rights secured to him by the Constitution of the United States, but on account of rights secured to him by the Constitution of the State, namely, protection against special or class legislation."

Record, pp. 8–9.

As before stated, we insist that when plaintiff was deprived of the **right** to vote it was a deprivation of a "right secured to him by the Constitution of the United States," and therefore a federal question was presented and the Circuit Court below did have jurisdiction to inquire into plaintiff's case and ascertain whether plaintiff was deprived of this right legally or illegally; and the action of the Circuit Judge in refusing to so inquire and ascertain was erroneous; the mere fact that the State Courts had jurisdiction also did not deprive the United States Circuit Court of jurisdiction. The jurisdiction of the two Courts was concurrent. We urge this as conclusive of the case here presented, and insist that the case must be remanded.

Wiley vs. Sinkler, 179 U. S., 58.

But, if mistaken, and if it be true, as the Circuit Judge conceived, that the declaration must not only state a case showing the plaintiff deprived of his right given by the Federal Constitution to vote for a member of Congress, but that we must go further and show that the enactment, by virtue of which he was deprived of this right, was illegal, because in violation of the United States Constitution as well, we think the declaration states such a case.

We think further that the Circuit Judge was manifestly wrong when he conceived it was only the Constitution of Tennessee that protected against "special or class legislation," and impliedly held that the Federal Constitution did not afford such protection.

Record, p. 9.

We insist the Federal Constitution affords equally as strong protection against class legislation as does the State Constitution, and, in fact, Article 11, Section 8 of the State Constitution is by the Courts of Tennessee given substantially the same construction and effect as is the Fourteenth Amendment to the Federal Constitution by this Court; and, if the State Constitution afforded plaintiff protection against the Statute in question as class legisla tion, then the Federal Constitution likewise did so, and the Circuit Judge was therefore wrong, from this point of view.

Pope vs. Phifer, 59 Tenn., 683. (8 Heish.)
Stratten vs. Morris, 89 Tenn., 541.
Henley vs. The State, 98 Tenn., 698.
Sutton vs. The State, 96 Tenn., 710.
R. R. vs. Ellis, 165 U. S., 154-6.
Wagoner vs. Bank, 170 U. S., 294.

The County Courts of the various counties are the representatives of the citizens of the various counties, and, moreover, are **corporations.** Being corporations, they were entitled to **equal protection** before the law, just the same as citizens, and, in as much as these corporations (the County Courts) in all other counties in the State were left free to change, alter and modify district lines and create

new districts in their counties, a right which all counties had been given and exercised for more than fifty years, it was arbitrary and class legislation to single out Rhea County and prohibit its County Court from doing so.

"Every County is a corporation, and the Justices in the County Court assembled are the representatives of the County and authorized to act for it."

Const., Art. 10, Sec. 4.
Const., Art. 2, Sec. 29.

Not only was this a discrimination either in favor of or against Rhea County, through its corporate representative, the County Court, with respect to the **other Counties** in the State of the **same class**, of which the declaration avers there were many; but it was a discrimination either in favor of or against the citizens of the Fourth Civil District of Rhea County, as laid out by the Legislature, with reference to those of the other three districts as laid out by said legislative enactment. The County Court was left free to change the lines as to the other three districts, but forbidden as to the Fourth District.

Chapter 163 Acts of 1899.

By this Act of 1899 increased tax burdens were imposed; the other counties and citizens of the same class in the State except as to Rhea were not affected; the Civil Districts of Rhea County were made large and unwieldy and of "inconvenient size" for police protection and otherwise in violation of a clause of the State Constitution requiring them to be of "convenient size;" plaintiff and other illiterate persons were deprived of a "right protected by law" in Tennessee just as certainly and effectually as if it had been enacted in so many words that they should not be allowed to vote and this all for partisan purposes, to make the Third and Fourth Legislative Districts of 2,500 population so as to apply the Dortch Law.

Record, pp. 4–6.
State Const., Art. 6, Sec. 15.
The State vs. Staten, 46 Tenn., 233. (6 Cold.)

While all reasonable presumptions will be indulged in favor of the action of the legislative branch of the government, andthe Courts will give great weight to classifications adopted by the legislature in enacting class legislation, yet the courts will not abdicate their functions in deference to the legislature; there is no reason here disclosed for this extraordinary enactment, while the declaration avers such facts as show it to be clearly a **special law** singling out Rhea County from "a number of other counties of the same class and similar in all material respects."

To indulge a presumption in the face of the declaration "to the extent of holding there must be some undisclosed or unknown reason" for this enactment is indeed "to make the protecting clauses of the Fourteenth Amendment a mere rope of sand in no manner restraining State action."

R. R. vs. Ellis, 165.U. S., 156–6.

We think then Chapter 163 Acts 1899, applying only to Rhea County, leaving, as the declaration avers, various other similar Counties unaffected; increasing the tax burdens of the citizens of Rhea County; decreasing the representation of Rhea County's citizens in her County Court; curtailing the powers of her County Court, which, by her Constitution, is a corporation; and arbitrarily ignoring the Constitutional provisions, Statutes and established precedents of more than fifty years, simply for the purpose of making one or more districts of Rhea County of 2,500 population, and thus imposing upon her citizens the increased expense of elections and County government, before pointed out, and upon the citizens of one or more of her civil districts the requirements incident to voting under the Dortch Law, while the other districts were not thus affected, is the most vicious form of arbitrary and class legislation from both a State and Federal standpoint.

R. R: vs. Ellis, 165 U. S., 154–6.
Stratton vs. Morris, 89 Tenn., 541.
The State vs. Staten, 46 Tenn., 233. (6 Cold.)
Pope vs. Phifer, 59 Tenn., 683. (3 Heisk.)

To summarize, we submit when the declaration averred that plaintiff was deprived of the elective franchise, a right in Tennessee under the Staten case, which has its origin in the Federal Constitution, as held in Wiley vs. Sinkler, 179 U. S., 58, and that such denial was the result of the willful, deliberate, wrongful and illegal action of the defendants, that it stated a case of which the Circuit Court had jurisdiction.

Assume, for argument's sake, that Chapter 163 Acts 1899 of Tennessee was an intringement only of the State Constitution, and not that of the United States, can it be said that such invalid enactment would excuse the defendants for depriving plaintiff of any right that he had, either State or Federal? Suppose it was any other property or right belonging to plaintiff that was infringed; suppose this litigation were in the State Court; his Honor, the Circuit Judge, impliedly held that if Chapter 163 aforesaid was invalid plaintiff had a cause of action in the State Courts of Tennessee (Record, 9).

An unconstitutional law is no law; is practically a nullity, and will not authorize the withholding of the elective franchise.

Lynn vs. Polk. 76 Tenn., 130–1. (8 Lea)
Cooley's Const. Lim. (5th Ed.) 224.
The State vs. Staten, 46 Tenn., 233. (6 Cold.)

Now, if plaintiff have a cause of action in the State Courts, as intimated by the Circuit Judge, it is because he has been **deprived of a Federal right or privilege**, springing out of the **Federal Constitution**, and which emanates from no other source; consequently, the Circuit Court did have jurisdiction and should entertain this suit for the purpose of determining whether such denial was warranted. And we think, whether Chapter 163 aforesaid be constitutional from either a State or Federal standpoint, it matters not; the plaintiff has been deprived of a right by the defendants, "knowingly, willfully, deliberately and wrongfully," acting under an unconstitutional law. His

right had its origin in the Federal Constitution. An unconstitutional law is no law and is a nullity, and there was therefore no warrant for depriving plaintiff of this right, and it can make no difference that Chapter 163 did not specially infringe the Federal Constitution; if it infringed the State Constitution, it was no protection to defendants.

Wiley vs. Sinkler, 179 U. S., 58.
Lynn vs. Polk, 76 Tenn., 130–1. (8 Lea)
Cooley's Const. Lim. (5th Ed.) p. 224.

But Chapter 163 Acts of Tennessee 1899 is unconstitutional and in violation, not only of the Tennessee Constitution, but of the Fourteenth Amendment to the Federal Constitution, because class legislation of the most vicious type. And, even in this view, his Honor, the Circuit Judge, was in error and the cause should be remanded.

R. R. vs. Ellis, 165 U. S., 154–6.
14th Amd. to U. S. Constitution.
Henley vs. The State, 98 Tenn., 698.
Wagoner vs. Bank, 170 U. S,, 294.

Respectfully submitted,

FREDERICK LEE MANSFIELD,

Attorney for Plaintiff.

No. 487.
Br. of Templeton for Def't.
Filed April 7, 1902.

Office Supreme Court U.S.
FILED
APR 7 1902
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1901

No. 487.

THOMAS SWAFFORD, PLAINTIFF IN ERROR,

vs.

W. A. TEMPLETON AND S. H. PEARCY.

(18,340)

Brief for Defendant in Error.

In Supreme Court of United States.

No. 487

THOMAS SWAFFORD, in error,

vs.

W. A. TEMPLETON AND S. H. PEARCY.

Brief for W. A. TEMPLETON, Defendant

I

The declaration. Record 2-6.

Plaintiff claims damages personally against defendants, acting as Election Judges at the State and National Election; held November 6, 1900.

It should be noted that—

(a) There is no allegation of personal discrimination against plaintiff.

(b) Plaintiff concedes that defendants offered to allow him to vote, if he would comply with the State law and regulations as other voters of his County did, and that he failed to do so or even attempted to do so.

(c) Plaintiff seeks to excuse himself by alleging that the State law under which defendants were acting, was in violation of a provision of the State Constitution but he shows that "the defendants were a majority of a board of three election Judges, appointed by the board of election commissioners in and for Rhea County to hold said election."

Rec. 3.

It thus appears from the declaration that these defendants were appointed to hold said election, by the authorities, viz.: "The board of election commissioners," named in the State law attacked, and that defendants were not lawfully holding said election, if said law was in violation of the State Constitution. Independently of that law, the Judges of election could only be appointed by the County Court.

(d) Plaintiff's only claim of Federal Jurisdiction and of personal damage against defendants is based on his assumption that by the Fourteenth amendment to the Federal Constitution Section 1, it is provided that "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States * * * nor deny to any person within its jurisdiction the equal protection of the laws."

Plaintiff insists that this provision is violated and that he is entitled to damages because the State law under which said election was regulated and which prescribed the qualification of voters, is in violation of the State Constitution. It is sought to get this Court to adjudge, first, that said State law was in violation of the State Constitution and that said election should have been held under the previous law. Second, that, by the previous State law, complainant would have been entitled to vote, without registration and marking of his ballot, which regulation the new law required, and, third, that said Fourteenth Amendment entitled plaintiff to vote according to the regulations applicable to voters under the former State law, in an election held by officers appointed and acting under the new law and sworn to execute its provisions.

Defendants demurred to the declaration and the demurrer was sustained and plaintiff's suit was dismissed both on the grounds stated in the demurrer and because no Federal question was presented.

Rec. 7-10.

We append to this Brief, Copies of the Tennessee Statute containing the provisions of the "Dortch Law" material to be now considered and the material provisions of the general law of the State here involved and applicable to counties not coming under the "Dortch Law." The quotations are from "Shannon's Code of Tennessee," the latest (1894). We also quote in said appendix the material provisions of the Act of 1899, which applies said "Dortch Law" to Rhea county, and which is the Act assailed by plaintiff.

II

We now submit,

(1) A Federal question is not involved simply because a National Election is being held. Although the right to vote at a National Election, is secured by the Federal Constitution, yet Congress has so far left the qualifications of voters to the several States. So of regulations governing the election, with certain qualifications as shown in U. S. Rev. Statutes 5508 to 5520 not involved in this suit.

We cite the U. S. Constitution Art. 1, Sec. 4, "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof but the Congress may, at any time, by law, make or alter such regulations except as to the places of choosing Senators."

The U. S. Constitution and laws do not confer upon the citizen the right to vote but only the right not to be discriminated against as a voter.

Menor vs. Happersett 21 *Wall.* 162.
U. S. vs. Reese, 92 *U. S.* 214.
McPherson vs. Blacker, 146 *U. S.* 1.
Cooley's Principles of Constitutional Law 291.
U. S. vs. Cruikshanks, 92 *U. S.* 542.
Ex Parte Yarbrough, 110 *U. S.* 651.
In Re Coy, 127 *U. S.* 749.

(2) As the Congress has not passed laws regulating national elections except so far as to prevent discriminations or intimidation, in the absence of an averment that plaintiff was discriminated against or intimidated, no question arises under the Federal Constitution or laws. The opinion of the trial Court is correct.

Rec. 9-10.

In Ex Parte Yarbrough, 110 U. S. 651, intimidations and conspiracy were alleged.

In Wiley V. Sinkler, 179 U. S. 59, it was alleged, without qualification, that a national election was being lawfully held, that plaintiff was a lawful voter and that his vote was unlawfully re-

fused—a case of unlawful discrimination. But plaintiff went out of Court for want of an averment of registration required of voters by State law.

(3) This Court will not pass on the question whether the Act of 1899, Ch. 163, placing Rhea County under the provisions of the "Dortch Law," was in violation of the State Constitution or not. Nor will this Court entertain an action to hold defendants personally liable in damages for impartially executing a law under which they were appointed.

The declaration shows that defendants were appointed as Election Judges by the Election Commissioners of Rhea County. This was according to the "Dortch Law," otherwise, elections are held by the Sheriff and the Inspectors or Judges appointed by the County Court.

See Appendix.

If the special Act placing Rhea County under the provisions of the "Dortch Law," is unconstitutional by State Law, then defendants were not lawfully Judges of Election and were without authority. There was therefore no lawful election.

10 *Amer. & Eng. Ency.* 671.

Schafe vs. Tillman, 2 *Bart. El. Cases* 907.

In Wiley V. Sinkler, 179 U. S. 66, this Court refused to pass on the Constitutionality of the State law on the subject of registration, in case alleging a lawful election and reserved the question as to whether election Judges lawfully appointed, were liable in damages for refusing a vote which the State statute forbade them to receive.

That they were not liable, see—

Mechem on Pub. Officers, 638-9.

McCrary on Elections, 254, 257.

Brightly's Lead. Cases on Elections, 190.

10 *Amer. & Eng. Ency.* 675.

State vs. Slatem, 46 *Tenn.* (6 *Cold.*) 246.

Rail vs. Potts, 27 *Tenn.* (8 *Hump.*) 225.

(4) All special Acts are not unconstitutional by the constitution of Tennessee. A special Act must contain some unjust

discrimination and work a real injury, to make it obnoxious to the inhibition against class legislation.

Although the constitution provides for Circuit and Chancery Courts throughout the State, yet special Courts may be created for particular counties.

State vs. Lindsay, 103 *Tenn.* 635.
Coleman vs. Campbell, 3 *Shan. Tenn. Cases* 355.
Halsey vs. Gains, 2 *Lea* (*Tenn.*) 316.

So of an act authorizing particular counties to subscribe to R. R. Stock.

Lauderdale Co. vs. Furgison, 75 *Tenn.* (7 *Lea*) 153.

So of an Act giving "Cotton merchants a special tax.

Parker vs. Parks, 68 *Tenn.* (12 *Heisk.*) 633.

So of game laws applicable to particular counties.

Act 1901, *Ch.* 259 *p.* 571.

So of a special act creating board of Road Commissioners for certain counties.

Act 1901, *Ch.* 8 *p.* 10.

This act was assailed on the same grounds urged by plaintiff in the case at bar, in the case of Condon et al Road Commissioners vs. Maloney, Judge of Knox County, decided by Supreme Court of Tenn., Sept., 1901. The act was sustained.

See certified copy of Mss. opinion filed with the clerk of this Court.

So the "Dortch Law" itself was sustained.

Cook vs. State, 90 *Tenn.* 407.

An inspection of the Act itself will show that it was intended to prevent repetition, bribery, intimidation or other fraud in elections.

The inherent power of Legislatures to divide counties into civil districts, is conceded by plaintiff's brief. Although laws must be general, it does not follow that, in dividing counties into civil districts, the Legislature may not divide some by direct Act and others through the agency of the County Court.

There may be special reasons addressing themselves to the wisdom of the legislature. But this is a question arising under State Constitutions and laws, for the State Courts to decide.

In any case, plaintiff can not in this proceeding assert any supposed right of his County, as a quasi public corporation to attack the Act in question. He was accorded every privilege accorded all other voters of his County.

We submit that this case is without merit and shows neither cause of action nor a Federal question.

Respectfully submitted,

JEROME TEMPLETON.

APPENDIX TO BRIEF

Tennessee Election Laws. Provisions of Dortch Law. Shannon's Code of Tennessee

Section 1189. "Applies to Counties of 50,000 or more inhabitants and towns and districts of 2,500."

"In all Civil Districts, Wards and voting precincts in counties which have a population of 50,000 or over that number, computed by the federal census of 1890, or which may hereafter have that number or over computed by any subsequent federal census; and in all cities, towns and civil districts having a population of 2,500 or over that number, computed by the federal census of 1890, or may hereafter have that number or over, computed by any subsequent federal census; each and every voter, in addition to the other regulations required by law, shall be registered as a voter as hereinafter provided before he shall be allowed to exercise the elective franchise in any election held in any civil district, ward or voting precinct, in said counties having a population as herein provided;

Provided, That the last published census shall control in every case.

(Act Extra Sess. 1890, Ch. 25, Sec. 1; Act 1891, Ch. 224, Sec. 1; Ex. Ses. 1891, Ch. 12).

Section 1191. "A board of three commissioners of registration, two of whom shall constitute a quorum for the transaction of business, shall be appointed by the governor for each county in which the provisions of this article require the registration of voters in the whole of said county, or in any city, town or civil district, and said commissioners shall be citizens of and qualified voters, as provided by law, in the counties for which they are appointed and of whom not more than two shall be of the same political party * * *."

Section 1193. "It is also made the duty of said commissioners of registration, and the power and authority is hereby conferred upon them to appoint at some convenient period, prior to all elections held under the provisions of this article one of the three judges and one of the two clerks of election in each ward and district and voting precinct of the city or county to which this article applies; and the County Courts, Mayors and Boards of Mayor and Aldermen and Sheriffs, in the counties and cities within the provision of this article, are hereby divested of the authority to appoint more than two of said three Judges and not more than one of the two clerks of said elections; and the County Courts, Sheriffs, Mayors and Boards of Mayor and Aldermen in making the appointment of the other two Judges shall appoint one from each of the political parties most numerously represented in such ward or districts or voting precincts of said cities or counties."

Act 1891, Ch. 224, Sections 2 and 3.

Section 1199. "No voter shall be allowed to vote in any election wherein registration is required by law, unless he shall have first registered, under the provisions of this article, as much as twenty days before the election wherein he offers to vote, is held * * *."

Section 1211. "All persons qualified to vote under existing laws at the date of his application, or who may become qualified by reason of his arriving at the age of twenty-one years by the date of the elections for which the registration is had, or who will be qualified by reason of having resided in the State for twelve months and county six months by the date of said elections, shall be entitled to be registered as a voter under this article."

Amendment to Ch. 224, Sec. 2 and 3, of the Act of 1891.

"Be it enacted, etc., that Section 3 of the said Act, be and it is hereby amended, by adding thereto the following: It is also made the duty of said commissioners of registration and the power and authority is hereby conferred upon them, to appoint prior to all elections held under the provisions of this Act, the three Judges and the two clerks and officer or officers to hold such elections to

the exclusion of the Sheriffs and Coroner or other officer or person heretofore possessing said power of appointment of elections in each ward and district and voting precinct of the city or county to which this act applies, and the County Court, Mayors and Boards of Mayor and Aldermen and Sheriffs in the counties and cities within the provisions of this Act, are hereby divested of the authority to appoint said officers, judges and clerks of said election. All three of the judges shall not be from the same political party, if persons from different political parties are willing to serve; and they shall be appointed from the two political parties most numerously represented in such ward or district.

Acts of 1897, Ch. 16, pg. 139.

General law before Acts of 1890 and 1891 and Amendment thereto, and yet in force in other counties.

Shannon's Code of Tennessee.

Section 1178. "The sheriff or if he is a candidate, the coroner, or if there be no coroner, some person appointed by the County Court, shall hold all popular elections; and said officer or person shall appoint a sufficient number of deputies to hold said elections."

Section 1181. "The County Court, at the session next preceding the day of election; shall appoint three inspectors or judges, for each voting place, to superintend the election."

MANNER OF VOTING.

Shannon's Code of Tennessee.

Section 1245. "The officer in each county whose duty it is to hold the election and appoint polling places therein, as herein provided for, shall cause the same to be suitably provided with a sufficient number of voting shelves or tables, at or on which voters may conveniently mark their ballots. Each compartment, table or shelf shall be so arranged that it shall be impossible for one voter at one table, or in one compartment, to see another voter at another table or compartment in the act of marking his ballot. The arrangement shall be such that neither the ballot boxes nor the voting shelves or compartments, shall be hidden from the view of the judges of election or those just outside a guard rail which may

run in front of the ballot box. The number of such voting shelves, tables or compartments shall not be less than three for every one hundred voters qualified to vote at such voting places * * *."

Section 1247. "Upon receipt of his ballot, the voter shall forthwith enter the room in which the voting is to take place and present to the assistant registrar, his blank ballot and certificate of registration, provided the registrar shall, upon demand, of any voter made at the time his ballot is handed to him, give to such voter a correct statement of the order in which the title of the various offices to be filled, stand upon the particular ballot furnished to such voter. The assistant registrar shall then number the ballot upon the stub thereof and also place upon the certificate of registration the same number."

Section 1248. "He shall then go to one of the voting shelves, tables or compartments and shall prepare his ballot by marking in the appropriate margin or place, a cross (X) opposite the name of the candidate of his choice for each office to be filled, or by filling in the name of the candidate of his choice in the blank space provided therefor and marking a cross (X) opposite thereto. * *."

Section 1251. "He shall then vote in the manner provided by law. He shall mark and deposit his ballot without undue delay and shall quit said inclosed place or room as soon as he has voted. No such voter shall be allowed to occupy a voting shelf, table or compartment already occupied by another, nor longer than ten minutes if other voters are not waiting, nor longer than five minutes if other voters are waiting."

Act of 1899, Ch. 163, Pg. 311.

"Section 1. Be it enacted by the General Assembly of the State of Tennessee, That there are hereby created and established for and within the County of Rhea, in this State, and in lieu of the fourteen civil districts therein, as now laid out, four civil districts only," setting out their boundaries.

Passed April 7, 1899.

Supreme Court of the United States.

No. 487.—October Term, 1901.

Thomas Swafford, Plaintiff in Error, *vs.* W. A. Templeton and S. H. Pearcy. } In error to the Circuit Court of the United States for the Eastern District of Tennessee.

[May 19, 1902.]

This action was begun by Swafford, plaintiff in error, in the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee. Templeton and Pearcy, defendants in error, were made defendants to the action, the object of which was to recover damages for an asserted wrongful refusal by the defendants to permit the plaintiff to vote at a national election for a member of the House of Representatives, held on November 6, 1900, in the district of the residence of the plaintiff.

The declaration expressly charged that the plaintiff was a white man, a natural-born citizen of the United States, and was such on November 6, 1900, and had been for many years prior thereto a resident and duly qualified voter in the county of Rhea, State of Tennessee, and, as such, entitled under the Constitution and laws of the United States and of the State to vote for members of Congress, and that he had been illegally deprived of such right by the defendants, when serving as election officers at an election held on November 6, 1900, in the district of the residence of the plaintiff, in said county of Rhea.

The declaration specified the manner in which the right which it was asserted existed under the Constitution and laws of the United States and of the State had been violated, as follows: That for a number of years there had been in force in Tennessee certain special registration and ballot laws, which were operative only in counties containing a population of fifty thousand inhabitants or over, and in cities, towns and civil districts having a population of twenty-five hundred inhabitants or over; that Rhea County was not, prior to 1899, affected by the legislation in question, because it did not have a population of fifty thousand or upwards, and had no town, city or civil district within its borders containing a population of twenty-five hundred; that, not being subject to the operation of the statutes in question, the elections in Rhea County, as in other counties similarly situated, were governed by, and conducted in accordance with, the general election laws prevailing in the State of Tennessee; that in 1899 the legislature of Tennessee passed a law known as chapter 163 of 1899, by which

the civil districts or subdivisions theretofore existing in Rhea County were diminished in number, and so arranged as to cause the civil district in which the plaintiff lived and was entitled to vote to contain a population of over two thousand five hundred inhabitants, and therefore to become subject to the aforesaid special registration and election laws, if the redistricting law in question was valid. It was further averred that at the election held on November 6, 1900, for a member of Congress, the defendants, who were a majority of the election judges conductiug such election, when the complainant presented himself to vote, insisted that he mark his ballot, and fold it in a particular way without assistance, as required by the special ballot law. It was asserted that this demand by the election officers was lawful if the special ballot law applied to the conduct of the election, but was unlawful if the election in Rhea County was not subject to such special law and was controlled by the general election law of the State. Averring that he was an illiterate person and unable to mark or fold his ballot, unassisted, and was therefore not able to comply with the provisions of the special ballot law referred to, it was alleged that the vote of plaintiff was rejected by the defendants, despite the insistence of the plaintiff that the election ought legally to have been conducted according to the requirements of the general law and not by those of the special law, for the reason that the redistricting act of 1899 was absolutely void.

The grounds upon which it was alleged that the act of 1899 redistricting Rhea County was void may be thus summarized: Because it was "class legislation in violation of the Federal Constitution," it being asserted that said law was enacted for partisan purposes, and that although there were other counties in the State similiarly situated as was Rhea County, the civil districts as laid out by the county courts in such other counties, pursuant to statutory authority, were left undisturbed by the legislature. In other particulars, also, the act in question was averred to constitute special or class legislation. It was specially averred that, as prior to the adoption of the Fourteenth Amendment to the Constitution of the United States, plaintiff enjoyed the elective franchise, by virtue of that amendment and of enumerated provisions of the State constitution "plaintiff became, and was possessed of, the right of suffrage as an immunity or privilege of citizenship, of which he could not be deprived by the enactment of chapter 163 (the law of 1899) under the circumstances aforesaid."

The defendants filed a demurrer questioning the sufficiency of the declaration upon various grounds.

After hearing upon the demurrer, the court filed an opinion in which it said that it clearly appeared from the declaration that the action did not really and substantially involve a Federal question, and that the court was without jurisdiction or power to entertain the suit. (108 Fed. Rep. 309.) An entry was made sustaining the demurrer and dismissing the

suit, and it was recited that the dismissal was solely because of the want of jurisdiction. A certificate of the judge, moreover, was filed, which is as follows:

"In this cause I hereby certify that the order of dismissal herein made is based solely on the ground that no Federal question was involved, and that the declaration, in my opinion, disclosed the infraction of no right arising under or out of the Federal laws or Constitution; and that treating the demurrer as presenting this question of jurisdiction, and acting also independently of the demurrer, and on the court's own motion, the suit is dismissed only for the reasons above stated; that is, that the controversy, not arising under the laws and Constitution of the United States, there is consequently no jurisdiction of the Circuit Court of the United States.

"This certificate is made conformably to act of Congress of March 3, 1891, chapter 517, and the opinion filed herein April 30, 1901, is made a part of the record, and will be certified and sent up as a part of the proceedings, together with the certificate."

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

The sole question is, Did the Circuit Court err in dismissing the action, on the ground that it was not one within the jurisdiction of the court? An affirmative answer to this question is rendered necessary by the decision in *Wiley* v. *Sinkler*, (179 U. S. 58.) In that case the action was brought in a Circuit Court of the United States against State election officers to recover damages in the sum of twenty-five hundred dollars for an alleged unlawful rejection of plaintiff's vote at a Federal election. A demurrer was filed to the complaint. One of the grounds of the demurrer was that the court had no jurisdiction of the action, because it did not affirmatively appear on the face of the complaint that a Federal question was involved. The demurrer, however, was sustained, not because of the want of jurisdiction, but solely upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The cause was brought directly to this court, under that provision of the act of March 3, 1891, which confers power to review the judgment or decree of a Circuit Court, among others, in any case involving the construction or application of the Constitution of the United States. In this court the contention was renewed that the Circuit Court was without jurisdiction, and this contention involved necessarily also a denial of the power of this court to review, since the right directly to do so was sustainable alone upon the ground that the cause was one involving the construction or application of the Constitution of the United States. The argument advanced to sustain the asserted want of jurisdiction was this, that as the Constitution of the United States did not confer the right of suffrage upon any one, but the same was a privilege which the elector enjoyed under the Constitution and laws of the State in which he was entitled to vote, therefore the denial of the right to vote at an election

for a member of Congress did not and could not involve the construction or application of the Constitution of the United States. The court, however, decided otherwise, and, speaking through Mr. Justice Gray, said that the case "involved the construction and application of the Constitution of the United States;" that "the right to vote for members of Congress of the United States . . . has its foundation in the Constitution of the United States;" that "the Circuit Court of the United States has jurisdiction, concurrent with the courts of the State, of any action under the Constitution, laws or treaties of the United States, in which the matter in dispute exceeds the sum or value of $2,000;" and that, the action being "brought against election officers to recover damages for their rejection of the plaintiff's vote for a member of the House of Representatives of the United States, the complaint, by alleging that the plaintiff was, at the time, under the Constitution and laws of the State of South Carolina and the Constitution and laws of the United States, a duly qualified elector of the State, shows that the action is brought under the Constitution and laws of the United States." In concluding its examination of the question of jurisdiction, it was declared that "the Circuit Court, therefore, clearly had jurisdiction of this action." The conclusion thus expressed, by necessary implication, decided the power of this court to review, which would not have obtained, unless jurisdiction of the Circuit Court had been found to rest on the constitutional right.

It is manifest from the context of the opinion in the case just referred to that the conclusion that the cause was one arising under the Constitution of the United States was predicated on the conception that the action sought the vindication or protection of the right to vote for a member of Congress, a right, as declared in *Ex parte Yarbrough*, (110 U. S. 655, 664,) "fundamentally based upon the Constitution of the United States, which created the office of member of Congress, and declared that it should be elective, and pointed out the means of ascertaining who should be electors." That is to say, the ruling was that the case was equally one arising under the Constitution or laws of the United States, whether the illegal act complained of arose from a charged violation of some specific provision of the Constitution or laws of the United States, or from the violation of a State law which affected the exercise of the right to vote for a member of Congress, since the Constitution of the United States had adopted, as the qualifications of electors for members of Congress, those prescribed by the State for electors of the most numerous branch of the legislature of the State.

It results from what has just been said that the court erred in dismissing the action for want of jurisdiction, since the right which it was claimed had been unlawfully invaded was one in the very nature of things arising under the Constitution and laws of the United States, and that this inhered in the very substance of the claim. It is obvious from an in-

spection of the certificate that the court, in dismissing for want of jurisdiction, was controlled by what it deemed to be the want of merit in the averments which were made in the complaint as to the violation of the Federal right. But as the very nature of the controversy was Federal, and, therefore, jurisdiction existed, whilst the opinion of the court as to the want of merit in the cause of action might have furnished ground for dismissing for that reason, it afforded no sufficient ground for deciding that the action was not one arising under the Constitution and laws of the United States.

True, it has been repeatedly held that, on error from a State court to this court, where the Federal question asserted to be contained in the record is manifestly lacking all color of merit, the writ of error should be dismissed. (*New Orleans Waterworks Co.* v. *State of Louisiana*, 184 U. S. ——, and authorities cited.) This doctrine, however, relates to questions arising on writs of error from State courts where, aside from the Federal status of the parties to the action or the inherent nature of the Federal right which is sought to be vindicated, jurisdiction is to be determined by ascertaining whether the record raises a *bona fide* Federal question. In that class of cases not only this court may, but it is its duty to, determine whether in truth and in fact a real Federal question arises on the record. And it is true, also, as observed in *New Orleans Waterworks Co.* v. *State of Louisiana, supra*, that a similar principle is applied in analogous cases originally brought in a court of the United States. (*McCain* v. *Des Moines*, 174 U. S. 168; *St. Joseph & Grand Island R. R. Co.* v. *Steele*, 167 U. S. 659.) But the doctrine referred to has no application to a case brought in a Federal court where the very subject-matter of the controversy is Federal, however much wanting in merit may be the averments which it is claimed establish the violation of the Federal right. The distinction between the cases referred to and the one at bar is that which must necessarily exist between controversies concerning rights which are created by the Constitution or laws of the United States, and which consequently are in their essence Federal and controversies concerning rights not conferred by the Constitution or laws of the United States, the contention respecting which may or may not involve a Federal question depending upon what is the real issue to be decided or the substantiality of the averments as to the existence of the rights which it is claimed are Federal in character. The distinction finds apt illustration in the decisions of this court holding that suits brought by or against corporations chartered by acts of Congress are cases *per se* of Federal cognizance. (*Osborn* v. *Bank*, 9 Wheat. 817; *Texas & Pacific R. R. Co.* v. *Cody*, 166 U. S. 606.) It may not be doubted that if an action be brought in a Circuit Court of the United States by such a corporation, there would be jurisdiction to entertain it, although the averments set out to establish the wrong complained of or the defense interposed were unsub-

stantial in character. The distinction is also well illustrated by the case of *Huntington* v. *Laidley*, (176 U. S. 668,) where, finding that jurisdiction obtained in a Circuit Court, this court held that it was error to dismiss the action for want of jurisdiction because it was deemed that the record established that the cause of action asserted was not well founded.

It follows that the court below erred in dismissing the action for want of jurisdiction. Of course, in reaching this conclusion we must not be understood as expressing any opinion as to the sufficiency of the declaration.

The judgment of the Circuit Court is reversed and the action is remanded for further proceedings, in conformity with this opinion.

And it is so ordered.

True copy.

Test:

Clerk Supreme Court, U. S.